HUGHES, EFFINGER & CO. v. EPLING AND OTHERS.*

Supreme Court of Appeals: At Wytheville.

July 16, 1896.

Absent, Harrison, J.

1. FRAUDULENT CONVEYANCE—*Inconsistent reservation by grantor—Fraud per se.* A deed of trust on a stock of merchandise which provides that the grantor shall be suffered to remain in the possession and enjoyment thereof until default is made in the payment of the debt secured, and request by the creditor to foreclose, and without accountability to the trustee for the proceeds of sale made by the grantor, is fraudulent *per se.*

Appeal from a decree of the Hustings Court of the city of Radford, pronounced November 23, 1892, in a suit in chancery wherein appellants were the complainants and the appellees were the defendants.

Reversed.

The opinion states the case.

Hoge & Hoge, for the appellants.

Heflin & Dunlap, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

The only question to be decided in this case is whether or not the deed of trust whose validity is attacked by the appellants is fraudulent *per se.*

The grantor was engaged in the business of a retail merchant, having one store in East Radford and another in West Radford. He conveyed his stock of goods or merchandise at each place, together with all the fixtures in both storehouses, such as show cases, stoves and safes, and also a horse and buggy, to Heflin & Dunlap, trustees, to secure the payment of a debt due by him to G. W. Epling, and also to secure him as indorser upon two negotiable notes.

The deed provided that the grantor should "be suffered to remain in possession and enjoyment of the said stocks of goods or merchandise until default" should be made by the grantor in the payment of the negotiable notes, or of any renewals or continuations of the same, or any part thereof, or in the payment of the debt secured, and until G. W. Epling, the indorser and creditor, should require the trustees to sell. Until there had been both a failure to pay, and a demand to sell,

* Reported by M. P. Burks, State Reporter.

the grantor retained the possession and the right of disposition. There is not only no provision in the deed that he is to account to the trustees for the proceeds of sales made by him while in possession, nor any recognition that such sales are for their benefit, but the terms of the trust exclude any such idea, and necessarily imply that he had the right to dispose of the goods in his business for his own benefit, and to continue to do so as long as the negotiable notes could be renewed, and the party secured was content not to require a sale.

The law does not authorize such agreement. A creditor, in securing himself, must be careful that the contract by which he is secured does not contain provisions which do not benefit him, but which benefit the debtor, and were so intended, and are prejudicial to other creditors. It does not allow the creditor to make use of his own debt for any other purpose than his own indemnity. When he goes beyond this, and puts into the contract provisions which have the effect of shielding his debtor by allowing him to dispose of the trust subject for his own purposes, and by which other creditors are hindered and delayed in the collection of their debts, the contract cannot be upheld. The power retained was incompatible with the avowed purpose of the grantor to furnish indemnity to his creditor and indorser, and is fully adequate to the defeat of the provisions of the deed of trust.

This court, in *Lang v. Lee*, 3 Rand. (Va.) 410, held that, where such a power is retained by the grantor, his conveyance is fraululent *per se*, null, and void as to other creditors.

In the case of *Addington v. Etheridge*, 12 Gratt. 436, a merchant conveyed to a trustee all his stock of goods and the storehouse for the balance of the year, in trust to pay certain debts described in the deed. It provided that he should retain possession of and sell the goods in the usual line of his trade, and occupy the storehouse, until default in the payment of any of the debts, and until the trustee should be required by any of the creditors to close the deed by a sale. It was held to be fraudulent *per se*, because the power retained was incompatible with the avowed purpose of the trust, and fully adequate to the defeat of the provisions of the deed.

The doctrine laid down in those cases has been uniformly recognized and followed by this court. *Sheppards v. Turpin*, 3 Gratt. 373; *Spence v. Bagwell*, 6 Gratt. 444; *Marks v. Hill*, 15 Gratt. 400, 416; *Perry v. Bank*, 27 Gratt. 755; *Brockenbrough v. Brockenbrough*, 31 Gratt, at page 590; *McCormick v. Atkinson*, 78 Va. 8; *Wray v. Davenport*, 79 Va. 19; *Saunders v. Waggoner*, 82 Va. 316.

We are of opinion that the deed of trust in this case was fraudulent *per se*, and should have been declared null and void by the trial court, as to the creditors who established their debts in the case. The decree appealed from must therefore be reversed, and the cause remanded to that court, to be proceeded in, in accordance with this opinion.

Reversed.

State Savings Bank v. Baker.*

Supreme Court of Appeals: At Wytheville.

August 4, 1896.

Absent, Harrison, J.

1. Principal and Surety—*Accommodation endorser—Release by extension of time.* An endorser of a negotiable note for the accommodation of the maker is a surety of the maker, and if the time of payment is extended for the maker, without the consent of such endorser, by a binding agreement between the creditor and the maker, the endorser is released.

2. Principal and Surety—*Two notes for same debt—Credits—Release.* If the negotiable note of two or more makers upon which there is an accommodation endorser, is delivered as collateral for the note of one of the makers, and both notes are given to secure the same debt, delivered at the same time, and as parts of the same transaction, then all payments made on either note should go to the credit of both, and an extension of time to the principal on the collateral note by a binding agreement with the creditor, without the consent of the endorser, releases the endorser.

Error to a judgment of the Hustings Court of the city of Roanoke, rendered June 22, 1893, on a motion for a judgment, wherein the plaintiff in error was the plaintiff and the defendant in error and others were the defendants. *Affirmed.*

This was a proceeding by motion in the name of the State Savings Bank against the four makers and the endorser of a negotiable note for $550. The makers having failed to appear and make defence, and "the plaintiff having proved its claim to the satisfaction of the court," judgment was entered against them, and at a subsequent term a judgment in favor of the endorser against the holder. There does not appear to have been any pleadings on the part of the defendants. The record states that "this day came the parties, by their attorneys, and announced ready for trial, and thereupon came a jury, to-wit: . . . . (who) were sworn the truth to speak upon the premises, and

---

*Reported by M. P. Burks, State Reporter.